No. 93-2024

In the Supreme Court of the United States

OCTOBER TERM, 1993

FREEDOM REPUBLICANS, INC., AND
LUCENIA GORDON, PRESIDENT, PETITIONERS,

v.

FEDERAL ELECTION COMMISSION, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT FEDERAL ELECTION COMMISSION IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether Freedom Republicans alleged facts that satisfy the standing requirements of Article III of the Constitution in a suit against the Federal Election Commission grounded upon allegations of injury from another party.

2. Whether the judgment of the court below that the case should be dismissed can be affirmed on alternative grounds.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, vacating and remanding the judgment of the District Court, is published at 13 F.3d 412 (Pet. App. 1a-16a). The memorandum opinion and initial order of the United States District Court for the District of Columbia is reported at 788 F. Supp. 600 (Pet. App. 17a-27a).

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1994, and amended on January 21, 1994. On April 11, 1994, the court denied petitioners' petition for rehearing and suggestion for rehearing *en banc*. The petition for a writ of *certiorari* was filed on June 18, 1994. The

jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1). As discussed *infra,* the district court lacked jurisdiction over this case.

STATUTES INVOLVED

Article III of the Constitution and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, are reproduced at Pet. 2-4.

COUNTERSTATEMENT OF THE CASE

This is a lawsuit to review the Federal Election Commission's dismissal of an administrative complaint filed by the petitioners, Freedom Republicans, Inc., and Lugenia Gordon (collectively "Freedom Republicans"), alleging violations by the Republican Party of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. The court of appeals concluded that the case should be dismissed because Freedom Republicans lacks Article III standing to bring this suit against the Commission.

A. Background

The Commission is an independent federal agency that is responsible, *inter alia,* for determining the eligibility of presidential candidates and national political party nominating conventions to receive public financing under the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013. After determining that a political party has satisfied the statutory procedures and criteria, the Commission "certif[ies] to the Secretary [of the Treasury] for payment in full" the amounts to which the party is entitled to finance its convention. 26 U.S.C. § 9008(g).

Petitioner Freedom Republicans, Inc., is a nonprofit corporation that is "concerned with maintaining the his-

toric commitment of the Republican Party to the advancement of Americans of African descent, and with developing a genuinely representative organization for the Party without regard to race, color, or national origin" (App. 2a ¶ 3).[1] Petitioner Lugenia Gordon is a party to this case "only in her capacity as the President of the Freedom Republicans" (Pet. App. 19a n.3).

B. Freedom Republicans' Administrative Complaint

On December 12, 1991, Freedom Republicans filed an administrative complaint with the Commission alleging that the Republican National Committee, which received public financing for the Republican Party's 1992 national nominating convention, was in violation of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d *et seq.*, which prohibits exclusion from participation in, denial of benefits of, and discrimination under any "program or activity receiving Federal financial assistance" on the basis of a person's race, color, or national origin.[2] Freedom Republicans alleged that the Republican Party's method for apportioning delegates to its presidential nominating conventions discriminated against minorities, because delegates are allocated to each state delegation

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[1] For the Court's convenience, Freedom Republicans' judicial complaint is reprinted as an appendix to this brief (cited as "App. __").

[2] Federal agencies that extend "Federal financial assistance" to a "program or activity" are authorized to issue rules and regulations to effectuate Title VI, after the President has approved the regulations. 42 U.S.C. § 2000d-1. If, after a hearing, a federally assisted program is found to be engaging in discrimination prohibited by Title VI, the funding agency can seek compliance by informal methods; if informal methods fail, the agency may refuse to extend or continue further financial assistance. *Id.* However, before such termination of funding may take effect, the agency must provide, at least 30 days in advance, a full report to the appropriate congressional committee. *Id.*

based partly upon the state's success in electing Republican candidates and its support of the Republican candidate in the previous presidential election, and not exclusively according to each state's relative strength in the Electoral College. Freedom Republicans alleged that this allocation method reduced minority representation at the convention, because larger numbers of minorities live in states that have not supported Republican candidates.

The Commission's Office of General Counsel rejected the complaint, explaining (Pet. App. 28a) that the complaint did not allege any acts that would constitute a violation of the campaign financing statutes the Commission is authorized to enforce. *See* 2 U.S.C. § 437g(a)(1). The Commission forwarded the complaint to the Department of Justice.

C. Decision of the District Court

On January 17, 1992, Freedom Republicans filed suit against the Commission, claiming that its members have been injured by the Republican Party's allegedly discriminatory delegate-allocation scheme. Freedom Republicans asked the court to order the Commission to accept jurisdiction over its administrative complaint; to promulgate regulations implementing Title VI; to enforce compliance by the Republican National Committee with Title VI; to freeze all public funds in the possession of the Republican Party until it has complied with Title VI; and, if the Republican Party did not remedy the violations alleged, to terminate the Party's convention funding (App. 11a-12a). Freedom Republicans' complaint did not name the Republican Party as a defendant, nor did it request any judicial relief against the Party. Freedom Republicans moved for partial summary judgment on Count I of its complaint, asking the court to find jurisdiction and remand to the Commis-

sion for rulemaking under Title VI. The Commission moved to dismiss, claiming, *inter alia,* that Freedom Republicans lacked standing to bring this action against the Commission. On April 7, 1992, the district court found jurisdiction, granted Freedom Republicans' motion for partial summary judgment on the merits, and denied the Commission's motion to dismiss (Pet. App. 25a). On May 4, 1992, the court amended its order to specify that the Commission was required to "promulgate regulations under Title VI of the Civil Rights Act of 1964 governing the selection of delegates to the publicly-funded national party nominating conventions" (Pet. App. 26a).

D. Decision of the Court of Appeals

On January 18, 1994, the United States Court of Appeals for the District of Columbia Circuit, in a unanimous decision, vacated the judgment of the district court and remanded with instructions to dismiss (Pet. App. 1a-16a). Although the district court's decision had been challenged on several independent grounds, the court concluded that it "need not venture beyond the threshold question of standing in order to decide this case" (Pet. App. 6a). The court of appeals noted that this Court's precedents clearly establish that the burden of demonstrating standing is on the plaintiffs and that when, as here, the "plaintiffs' asserted injury stems from 'the government's allegedly unlawful regulation (or lack of regulation) of *someone else*' . . . the 'fairly traceable' and redressability prongs of standing analysis require more exacting scrutiny" (Pet. App. 9a) (emphasis in original) (quoting *Lujan v. Defenders of Wildlife,* 112 S.Ct. 2130, 2137 (1992)).

Applying those principles, the court first found that Freedom Republicans had failed to show that its members' alleged injuries from the Republican Party were caused by

the public financing program administered by the Commission. The court noted that the Republican Party had begun basing delegate-allocation on a state's past support of Republican candidates, in addition to the state's electoral college strength, after the Party's electoral failure in the 1912 presidential election, while the public funding of presidential nominating conventions did not begin until 1974 (Pet. App. 14a). Since the Republicans' delegate-allocation system had been in effect for half a century before public financing began, "the injury alleged in Freedom Republicans' complaint is not fairly traceable to any encouragement on the part of the government, but instead appears to be the result of decisions made by the Party without regard for funding implications" (Pet. App. 15a).

The court found that Freedom Republicans had also failed to allege any basis for believing that the alleged injuries from the Republican Party would be redressed by this lawsuit against the Commission. The court noted that prior to 1974 the Republican Party had consistently financed its presidential nominating conventions without government assistance (Pet. App. 15a). Because even an order requiring the Commission to terminate public funding would leave the Party free to retain its delegate-allocation rules by resuming private funding of its conventions, Freedom Republicans could not demonstrate that a judgment in its favor in an action against the Commission would redress the injuries it alleged its members were suffering from the Republican Party (Pet. App. 16a).

Based on Freedom Republicans' inability to show that the injuries it claimed from the Republican Party's rules were either caused by the public financing program administered by the Commission, or would be redressed by a court order against the Commission, the court concluded that the case must be dismissed for lack of Article III standing. It therefore vacated the district court's decision

and remanded with instructions that the case be dismissed. On April 11, 1994, the court of appeals denied Freedom Republicans' petition for rehearing (Pet. App. 29a).

ARGUMENT

I. WHY THE WRIT SHOULD NOT BE GRANTED

The decision of the court of appeals, that Freedom Republicans did not have standing to bring an action against a federal agency to require it to take action against a third party, involves only the application of settled principles of law to the particular facts of this case. The standing requirements applied by the court of appeals were reaffirmed by this Court only two years ago in *Lujan v. Defenders of Wildlife,* 112 S.Ct. 2130 (1992), and there is no conflict among the circuits. *See* n.4, p. 9, *infra.* Such a case does not warrant plenary review by this Court, and the petition should, therefore, be denied.

Article III of the Constitution requires parties seeking to invoke the jurisdiction of the federal courts to establish that they have standing to litigate their claim. At an "irreducible minimum," *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982), a plaintiff must show three things to establish standing: (1) that it has suffered an "injury in fact" that is "concrete and particularized," not "conjectural" or "hypothetical"; (2) that there is a "causal connection between the injury and the conduct complained of" making the injury "fairly trace[able] to the challenged action of the defendant," and not the result of actions by some "third party not before the court"; and (3) that it is "likely" as opposed to "merely speculative" that the injury will be "redressed by a favorable decision." *Lujan,* 112 S.Ct. at 2136 (citations omitted). *Accord, e.g.,*

Valley Forge, 454 U.S. at 472; *Allen v. Wright,* 468 U.S. 737 (1984).[3]

In the present case, Freedom Republicans chose to bring suit against the Commission even though it was the Republican Party's delegate-allocation rules, rather than any action by the Commission, that Freedom Republicans claimed had injured its members. In such a case, where the "plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else,*" *Lujan,* 112 S.Ct. at 2137 (emphasis in original), the causation and redressability elements of standing "hinge on the response of the regulated (or regulable) third party to the government action or inaction." *Id.* In such cases "it becomes the burden of plaintiff to adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury." *Id.* While "standing is not precluded" in such circumstances, "it is ordinarily 'substantially more difficult' to establish." *Id.* (quoting *Allen,*

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[3] Contrary to Freedom Republicans (Pet. 10-12), the causation and redressability elements of the standing inquiry are not relaxed when racial discrimination is alleged. *See Allen v. Wright,* 468 U.S. at 745 (redressability not satisfied in suit challenging government tax benefits to private segregated schools because it was "entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies"); *N.A.A.C.P., Boston Chapter v. Harris,* 607 F.2d 514, 521-22 (1st Cir. 1979). Petitioners offer no support for their assertion (Pet. 10-11) that the Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a, was intended to relax the constitutional standing requirements in Title VI suits against federal agencies, and this argument has also been waived because it was not advanced in the court below. *Kosak v. United States,* 465 U.S. 848, 850 n.3 (1984); *United States v. Lovasco,* 431 U.S. 783, 788 n.7 (1977). In any event, as this Court concluded in *Lujan,* 112 S.Ct. at 2144-45, Congress cannot eliminate the Article III standing requirements by statute.

468 U.S. at 758). Freedom Republicans did not even attempt to satisfy its burden of alleging facts to show that the Republican Party's "choices have been or will be made in such a manner as to produce causation and permit redressability of injury," *Lujan*, 112 S.Ct. at 2137, in their suit against the Commission.[4]

First, Freedom Republicans has alleged no facts that would indicate that the alleged injury to its members was caused by the public funding of the Republican Party's nominating conventions administered by the Commission. As noted by the court of appeals (Pet. App. 2a), the Republican Party has been allocating additional delegates since 1916 to states that have supported Republican candidates. This conclusion is not contested, for Freedom Republicans agrees (Pet. 5) that the delegate allocation system it challenges originated as early as 1916. *See also Ripon Society v. National Republican Party*, 525 F.2d 567, 582 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 933 (1976).

Public financing of nominating conventions, in contrast, did not begin until the 1976 elections, under amendments to the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, that were enacted in 1974 (Pub. L.

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[4] Petitioners have argued (Pet. 11-12) that the conclusion of the court of appeals that such a showing is necessary in this case creates a split in the circuits concerning standing under Title VI. This argument is wrong for two reasons. First, all of the cases cited by the petitioners were decided prior to *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992), in which this Court clarified the standing requirements in suits against the government based on alleged injuries from third parties. Second, in all but two of the cited cases the defendant was not a federal funding agency, like the Commission in this case, but instead was the party receiving public support that was alleged to be engaging in unlawful discrimination. The standing principles involving alleged third party injuries, as applied by the court of appeals, are not applicable in such cases. *See* pp. 13-14, *infra*.

No. 93-443, 88 Stat. 1294-96 (Oct. 15, 1974)). Having preceded public convention financing by more than 50 years, the Republican Party's delegate-allocation scheme obviously could not have been caused by the public funding program administered by the Commission. The Republican Party's delegate-allocation scheme was adopted to enhance the Party's electoral prospects, not to obtain public financing of its nominating conventions. *See Ripon Society,* 525 F.2d at 581-83, 586-88. Thus, as the court of appeals concluded (Pet. App. 15a), the injury alleged by Freedom Republicans is not fairly traceable to any "encouragement" by the government, but rather is the result of political decisions made by the Republican Party itself at a time when public convention financing did not even exist. *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976).

Second, Freedom Republicans has failed to allege any facts to demonstrate that its alleged injury from the Republican Party is "likely" to be "redressed by a favorable decision" in a suit against the Commission. *Lujan,* 112 S.Ct. at 2136. The courts obviously cannot order the Republican Party to abandon its delegate-allocation rules in a lawsuit against the Commission. The most Freedom Republicans could hope to obtain in a suit against the Commission would be an order to the Commission to terminate public financing for the Republican Party convention. However, as Freedom Republicans correctly conceded in the court of appeals, this would still leave the Party free to retain its time tested convention rules by foregoing public financing.[5] The Party has adhered to its delegate-allocation rules for

[5] "Even if, after an appropriate agency investigation and resolution of the complaint, the Party should nevertheless insist upon governing itself under a policy that the agency had found to violate the requirements of Title VI for participation of non-white and other minority party members, the Party would still be free to do so – without federal convention funding." (Freedom Republicans' D.C. Cir. Brief at 37-38).

almost 70 years in the belief that this system enhances the Party's electoral prospects, and it was able to finance its national conventions entirely with private funds for more than a hundred years before the advent of public convention financing. As the court of appeals concluded (Pet. App. 12a, 15a-16a), Freedom Republicans has not alleged any factual basis for assuming that if it succeeds in this litigation, the Party would not choose to resume private financing of its conventions rather than submit to a government mandate to restructure its internal operations in a manner the Party apparently believes would weaken its political strength. Thus, as in *Lujan,* "it is entirely conjectural whether the nonagency activity that affects [petitioners] will be altered or affected by the agency activity they seek to achieve." 112 S.Ct. at 2142 (plurality opinion) (citing *Simon,* 426 U.S. at 43-44).

Freedom Republicans' inability to show causation and redressability is enough to require that this case be dismissed for lack of Article III standing. Freedom Republicans argues (Pet. 14-15, 19) that it was entitled to have the case remanded to give it a second chance to present evidence to satisfy its burden of showing causation and redressability. Yet Freedom Republicans acknowledges (Pet. 6-7) that it neither requested a remand nor suggested there should be an evidentiary hearing until its petition for rehearing was filed, after the court of appeals had ruled against it. Since arguments raised for the first time in a petition for rehearing to the court of appeals are waived, *Boardman v. Estelle,* 957 F.2d 1523, 1535 (9th Cir.), *cert. denied,* 113 S.Ct. 297 (1992); *Browning v. Navarro,* 894 F.2d 99, 100 (5th Cir. 1990), this issue has not been preserved for presentation to this Court. See p. 8, n.3, *supra; cf. Prudential Federal Savings and Loan Ass'n v. Flanigan,* 478 U.S. 1311 (1986) (Rehnquist, Circuit Justice).

In any event, Freedom Republicans did not merely fail to present any evidence of causation and redressability when it moved for partial summary judgment in the district court. It also failed to *allege* in its complaint any facts indicating that its members' alleged injury from the Republican Party's delegate-allocation rules either was caused by the public financing of party conventions or would be redressed by a court order against the Commission. Freedom Republicans' complaint thus failed to make even "general factual allegations of injury resulting from the *defendant's* conduct," *Lujan,* 112 S.Ct. at 2137 (emphasis added), but alleged injury only from the Republican Party's rules. It has long been settled that a plaintiff "must allege in his pleading the facts essential to show jurisdiction," *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), and that the "necessary factual predicate may not be gleaned from the briefs and arguments," *Bender v. Williamsport Area School District,* 475 U.S. 534, 547 (1986). "If [a plaintiff] fails to make the necessary allegations [it] has no standing," *McNutt,* 298 U.S. at 189 (quoted in *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 230-31 (1990)), and the complaint can be dismissed.

Even now Freedom Republicans asserts no facts that could alter the causation and redressability analysis of the court of appeals. In this Court, Freedom Republicans only claims to have evidence that racial considerations played a role in the Republican Party's decision to change its delegate-allocation rules after the 1912 election (Pet. 7-8 n.6). Since this assertion, even if proven, would not show that the delegate-allocation rules either were caused by the public financing program initiated half a century later or would be altered by a court order against the Commission, the evidentiary hearing Freedom Republicans demands could not cure the standing defects found by the court of

appeals. Indeed, as discussed *supra*, pp. 9-11, the facts relevant to the causation and redressability analysis of the court of appeals have not even been contested. Freedom Republicans is plainly not entitled to a remand for an evidentiary hearing on issues that cannot alter the outcome of the case.

Finally, there is no truth in Freedom Republicans' hyperbolic assertion (Pet. 10) that the decision below "forecloses with finality any challenge to Republican Party rules and practices" and "unconditionally condones all such practices forever, however discriminatory in their effects." Neither the Commission nor the court of appeals has done anything to approve or disapprove the Republican Party's rules. The court of appeals in this case only concluded that Freedom Republicans cannot challenge the Republican Party's rules by filing a lawsuit against the Commission. The special causation and redressability problems the court of appeals found to be fatal in this indirect lawsuit would not even arise if a lawsuit challenging the delegate-allocation rules were brought directly against the Republican Party itself. *See Ripon Society*, 525 F.2d at 572-73. It has long been established that an allegedly discriminating private party can be sued directly under Title VI by an aggrieved plaintiff, and the courts of appeals have explained that such direct suits are "not merely adequate but in fact the proper means" for a private party "to enforce Title VI." *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 (D.C. Cir. 1990). *See also Salvador v. Bennett*, 800 F.2d 97, 99 (7th Cir. 1986) ("a complainant told that the agency will do nothing . . . may get 'review' not by suing the adjudicator but by pursuing the supposed offender"); *Marlow v. United States Dep't of Education*, 820 F.2d 581, 583 (2d Cir. 1987), *cert. denied*, 484 U.S. 1044 (1988). Such a lawsuit against the Republican Party might well prove unsuccessful on other grounds—for example, there is a cogent argument

that Title VI is inapplicable to the campaign financing statutes (see pp. 16-17, *infra*)—but it is clear that the decision below, addressing only the special standing defects in Freedom Republicans' suit against the Commission, would not foreclose Freedom Republicans from seeking this relief directly from the party it claims is injuring its members.[6]

II. ALTERNATE GROUNDS SUPPORTING THE JUDGMENT OF THE COURT OF APPEALS

There are at least three other adequate and independent grounds on which the court of appeals judgment can be affirmed, even though the court of appeals found it unnecessary to address them. *Schweiker v. Hogan*, 457 U.S. 569, 585 n. 24 (1982). The presence of those alternative grounds for affirmance might make it unnecessary for the Court even to reach the issues presented in the petition.

First, although Freedom Republicans has claimed standing only as the representative of its members' interests, it failed in its complaint to allege facts showing a concrete injury in fact to any of its members from the Republican Party's delegate-allocation rules. Even if injury from

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[6] Freedom Republicans offers no authority for its odd assertion (Pet. 5) that a lawsuit cannot be brought against a private party to enforce Title VI unless the funding agency has promulgated implementing regulations. This is not an argument this Court would review in any event because Freedom Republicans did not present it to the court of appeals. See p. 8 n.3, *supra*. Freedom Republicans told the court of appeals that it chose to bring suit against the Commission not because there was no legal basis for suing the Republican Party itself, but because it believes unlawful discrimination can be easier to prove in an administrative setting and because it viewed this as a "more moderate, less confrontational, strategy" that might "bring[ ] about reform in a manner that would preserve, as much as possible, collegial relations between white, nonwhite, and ethnic members within the Republican Party." (D.C. Cir. Brief at 27-28).

the Republican Party alone could establish standing to sue the Commission, it would not be enough to allege that the Party's rules are discriminatory; rather, Freedom Republicans would have to make allegations showing that its members have been " 'personally denied equal treatment' by the challenged discriminatory conduct." *Allen v. Wright,* 468 U.S. 737, 755 (1984). Freedom Republicans never alleged that any of its members had ever sought to become a delegate to the Republican national convention or a member of the Republican National Committee, much less any facts indicating that they were impeded from doing so by the Party's rules. *See Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) (plaintiff who had never applied for membership lacked standing to challenge club's allegedly discriminatory membership policies). Indeed, the complaint contained no factual allegations about any of Freedom Republicans' members having participated in the Republican Party's affairs at all, even so much as making a contribution or voting in a Republican primary. *Compare Ripon Society v. National Republican Party,* 525 F.2d 567, 572 & n.6 (D.C. Cir. 1975) (en banc), *cert. denied,* 424 U.S. 933 (1976). In the absence of such allegations, Freedom Republicans' suit is no more than "an asserted right to have the government act in accordance with the law," which provides an additional reason for dismissing this case for lack of standing. *Allen,* 468 U.S. at 754.

Second, Freedom Republicans lacked a statutory right of action against the Commission. Title VI itself provides no express judicial remedy to private parties claiming to be the victims of discrimination. In *Cannon v. University of Chicago,* 441 U.S. 677 (1979), this Court recognized an implied private right of action under Title VI against recipients of federal funding, and noted that the statutory structure of Title VI was "aimed at protecting individual

rights without subjecting the Government to suits." *Id.* at 715. Following this reasoning, the courts of appeals have concluded that there is no implied private right of action under Title VI and its sister statutes against a federal funding agency, such as the Commission in this instance, to require that agency to enforce Title VI against others. *See Washington Legal Foundation v. Alexander,* 984 F.2d 483 (D.C. Cir. 1993); *Women's Equity Action League,* 906 F.2d at 747, 748-51; *Salvador,* 800 F.2d at 99-100; *Marlow,* 820 F.2d at 583. Accordingly, since Freedom Republicans has no Title VI right of action against the Commission, this case would have to be dismissed regardless of Freedom Republicans' standing under Article III.

Finally, it does not appear that Title VI was intended to apply to the public campaign financing statutes. It has long been established that "political belief and association constitute the core of those activities protected by the First Amendment," *Elrod v. Burns,* 427 U.S. 347, 356 (1976) (Brennan, J.), and that "[a] political party's choice among various ways of determining the makeup of a State's delegation to the party's national party convention is protected by the Constitution." *Democratic Party of the United States v. Wisconsin,* 450 U.S. 107, 123-24 (1981). *See also Ripon Society,* 525 F.2d at 585. Requiring the Commission to regulate under Title VI the selection and allocation of delegates to the parties' national conventions would obviously interfere with these constitutionally protected activities. In such circumstances, this Court is "loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted these perils." *Public Citizen v. United States Dep't of Justice,* 491 U.S. 440, 446 (1989). *See also NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 507 (1979). Indeed, without specific evidence of such intent this Court has found it "outlandish" to assume "that

Members of Congress would vote for a bill subjecting their own political parties to bureaucratic intrusion or public oversight." *Public Citizen*, 491 U.S. at 453 n.9.

Congress actually made it quite clear when it enacted public financing that it did not intend thereby to give the government control over the internal governance of political parties. S. Rep. No. 93-689, 93d Cong., 2d Sess. 9-10 (1974), *reprinted in* [1974] U.S.C.C.A.N. 5595-96. In fact, this Court has already found that "Congress has expressed its determination to avoid the possibility" that "public funding will lead to governmental control of the internal affairs of political parties, and thus to a significant loss of political freedom." *Buckley v. Valeo*, 424 U.S. 1, 93 n.126 (1976). In these circumstances, Title VI cannot properly be construed to authorize the Commission to regulate the allocation of delegates to a political party's convention, and this provides an additional legal basis for dismissing this case.

CONCLUSION

For the foregoing reasons, the Federal Election Commission respectfully requests that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 92 0153

THE FREEDOM REPUBLICANS, INC., AND LUGENIA GORDON, PRESIDENT, 415 57TH STREET, BROOKLYN, NEW YORK, 02211
PLAINTIFFS,

v.

FEDERAL ELECTION COMMISSION, DEFENDANT.

COMPLAINT FOR CIVIL AND INJUNCTIVE RELIEF UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

1. This is an action for civil and injunctive relief under Title VI of the Civil Rights Act of 1964, 42 USC § 2000d.

Jurisdiction and Venue

2. Jurisdiction is founded on 28 USC § 1331 and 1343, 42 USC § 2000d; and the Administrative Procedure Act, 5 USC § 701 *et seq.* Venue properly lies in the United States District Court for the District of Columbia, 28 USC § 1391(e).

Parties

3. Plaintiff, The Freedom Republicans, Inc., a non-profit corporation organized under the laws of New York, is an organization a majority of whose members are of

African descent, founded in 1979 as a membership organization of Republicans concerned with maintaining the historic commitment of the Republican Party (the "Party") to the advancement of Americans of African descent, and with developing a genuinely representative organization for the Party without regard to race, color, or national origin, in the interest of promoting the best interests of the Party and the country now and in the future.

4. Plaintiff Lugenia Gordon is president of The Freedom Republicans, Inc. and resides at 415 57th Street, Brooklyn, New York 11220.

5. The Federal Election Commission ("FEC") is an independent federal agency established by and charged with administration and enforcement of the provisions of the Federal Election Campaign Act of 1971, as amended, 2 USC § 431 *et seq.* and 26 USC § 9001 *et seq.*, and with extension of election campaign funds to political candidates and organizations pursuant to federal laws.

Statement of Facts

6. In connection with the Republican National Presidential Nominating Conventions in 1980, 1984, and 1988, the Freedom Republicans have brought to the attention of Republican Party officials, including members of the Republican National Committee ("RNC"), the fact that the Party's rules for membership and delegate apportionment prevent a nationally representative proportion of black and other racial and ethnic minorities from selection as voting delegates at the quadrennial national presidential nominating conventions and as members of the RNC.

7. Instead, Party officials have reserved special interest seats for representatives of groups called "auxiliaries" comprised uniformly of individuals of a given racial or ethnic status. Members of such groups are

brought into the Party organization by designation rather than through the grass-roots selection process required of regular delegates to the national conventions and members of the National Committee. While they cannot vote or participate as regular delegates and members, they are kept involved through various advisory tasks and social activities.

8. In the interest of removing the necessity for the auxiliaries and in fostering full and fair opportunity for access to the Party's governing structure for all racial and ethnic groups, the Freedom Republicans have repeatedly urged the Party to assess the discriminatory effect of the existing rules, including sponsoring a motion that was adopted by the Rules Committee at the Dallas Convention in 1984.

9. In studying the issue, the Party has consistently rejected any standards that would make the process of delegate apportionment and RNC membership nationally representative of blacks and other minorities.

10. As a result of the delegate apportionment and RNC membership rules, the Party's structure systematically underrepresents blacks and other minorities regardless of their level of participation in Party affairs.

11. It is a fact, and documents submitted by the Freedom Republicans to the Republican Party and to the Federal Election Commission demonstrate it to be so, that black and other minority groups are, and will continue to be, underrepresented in the Republican National Committee and in the quadrennial presidential nominating conventions. Moreover, even if blacks and other minorities were to vote for Republican candidates and participate in Party activities at a level equal to their percentage in the population, their random chances of being seated as convention delegates or selected as national committee members would be unequal to those of whites and non-minorities. Implicit recognition of the lack of minority

representation on the Republican National Committee is found in the fact that the RNC reserves special interest seats for representatives of minority auxiliaries: blacks, Hispanics, and ethnic "heritage" groups.

12. The Committee on Arrangements for the 1992 Republican National Convention has already received in excess of $10 million from the United States Government as a result of an application to the Federal Election Commission. Most of these funds are unspent and will remain so until the summer and fall of 1992, when they will be used to pay the costs of the 1992 Republican National Convention.

13. Federal funding of the national conventions of the major parties is subject to the provisions of Title VI of the Civil Rights Act of 1964, 42 USC § 2000d, which provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

14. The Federal Election Campaign Act Amendments of 1974 provide, at section 406, an amendment to the Internal Revenue Code, § 9008, which reads in pertinent part as follows:

> (a) The Secretary [of the Treasury] shall maintain . . . a separate account for the national committee of each major party and minor party.
>
> . . .
>
> Subject to the provisions of this section, the national committee of a major party shall be entitled to payments under paragraph (3), with respect to any presidential nominating convention, in amounts

which, in the aggregate, shall not exceed $4,000,000 [increased by the cost of living index].

Such payments shall be used only—

(1) to defray expenses incurred with respect to a presidential nominating convention (including the payment of deposits) by or on behalf of the national committee receiving such payments; or

(2) to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds (other than contributions to defray such expenses received by such committee) used to defray such expenses.

15. Federal regulations adopted by the FEC provide broad authorization for expenditure of convention funds. They cover the following activities:

> Expenses for conducting meetings of or related to committees dealing with the conduct and operation of the convention, such as rules, credentials, platform, site, contests, call, arrangements and permanent organization committees, with such expenses including printing materials and rental costs for meeting space. 11 CFR 9008.6 (a)(4)(v).

16. Participation in the convention financing program of this legislation is optional. 1974 U.S. Code Cong. & Adm. News, 5676. There is nothing in this or any other provision of the relevant statutes or regulations that would remove the obligation of the FEC, as the agency certifying eligibility for convention funds, to implement Title VI with regard to the funding of presidential nominating conventions.

17. Under section 602 of Title VI, 42 USC § 2000d-1,

> Each Federal department and agency which is empowered to extend Federal financial assistance to any

> program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

At the very least, operation of Title VI would require that the FEC adopt implementing regulations and publish them in the Code of Federal Regulations, as well as accompanying procedures and personnel designations that such regulations ordinarily require. The prerequisite for this is simply that the agency involved is extending "Federal financial assistance."

18. Compliance with Title VI is "consistent with the achievement of the objectives of" the Federal Election Campaign Act, as this purpose has been expressed by Congress and interpreted in previous decisions. See HR Rep. No. 93-1239 (1974); *Buckley v. Valeo,* 424 U.S. 1, 104 (1976).

19. The establishment of agency regulations and procedures would be necessary even if no discrimination in the delegate or committee selection process were alleged. See, e.g., *Bryan v. Koch,* 627 F.2d 612 (2d Cir. 1980). No such regulations exist, and it can only be assumed that the Federal Election Commission has been, and remains today, unaware of its obligations under Title VI of the Civil Rights Act of 1964.

20. Existing FEC regulations contain the following provision:

> Public funds shall not be used to defray any expense the incurring of which violates any law of the

United States or any law of the State in which such expense is incurred or paid, or any regulation prescribed under federal or State laws. 11 CFR 9008.6 (b)(2).

21. The expenditure of FEC convention funds by the Republican National Committee under current rules is in violation of Title VI of the Civil Rights Act of 1964.

Exhaustion of Administrative Remedies

24. On December 12, 1991 the Freedom Republicans filed a complaint with the Federal Election Commission setting forth the above facts and claims, supported by documentary evidence. On December 23, 1991 the FEC, by its General Counsel, dismissed the complaint for lack of jurisdiction. The above-referenced history of efforts of the Freedom Republicans demonstrates that the aforementioned violations of Title VI of the Civil Rights Act of 1964 cannot be corrected by informal means.

Statement of Claim

COUNT I

25. The Federal Election Commission is in violation of Title VI of the Civil Rights Act of 1964, 42 USC § 2000d and § 2000d-1, for failure to (a) adopt implementing regulations and procedures for the enforcement thereof; (b) accept jurisdiction over the complaint cited in the preceding paragraph; and (c) take appropriate action with respect to said complaint.

COUNT II

24. The Republican National Committee and the Republican Party, as the recipients of Federal funds certified by the FEC, are in violation of Title VI for providing disparate treatment of blacks and other minorities.

25. The United States Department of Justice is designated under Executive Order 12250 as the coordinating agency to implement the requirement that Title VI regulations be approved by the President of the United States. The current regulations of the Department of Justice, which are used as a model for all federal agencies, and which are considered binding over those agencies that have failed to adopt regulations under Title VI, contain the following provisions with regard to the standards for compliance with the substantive requirements of Title VI (28 CFR 42.104):

> A recipient under any program to which this subpart applies shall not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:
>
> (i) Deny an individual any disposition, service, financial aid, or benefit provided under the program;
>
> (ii) Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
>
> (iii) Subject an individual to segregation or separate treatment in any manner related to his receipt of any disposition, service, financial aid, or benefit under the program;
>
> (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program;
>
> (v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which other individuals must meet in order to be provided any disposition,

service, financial aid, function or benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded to others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient . . . may not, directly or through contractual or other arrangements, utilize criteria or methods which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.

26. The rules governing convention delegate apportionment unfairly bias the selection process against racial and ethnic minorities. The apportionment of delegates is done through methods that necessarily prevent nationally representative selection by race, color, and national origin of all Americans who may belong to the Republican Party, because the Party uses a system that locks control over its governance in the strongest existing Republican constituencies, blocking access for ethnic and nonwhite Republican constituencies. The Party has been made aware of this by the Freedom Republicans repeatedly since 1980.

Hence, black and other minority citizens are (a) "restrict[ed] in the enjoyment of [an] advantage or privilege enjoyed by others" in violation of (iv); (b) "treated differ-

ently from others in determining whether [they] satisf[y] any admission, quota, eligibility, membership, or other requirement or condition which other individuals must meet in order to be provided any disposition, service, financial aid, function, or benefit provided under the program" in violation of (v); (c) afforded an opportunity to participate "which is different from that afforded to others under the program" in violation of (vi); (d) denied "the opportunity to participate as a member of a planning or advisory body which is an integral part of the program" in violation of (vii); and (e) the recipient "through contractual or other arrangements" utilizes "criteria or methods which have the effect of defeating or substantially impairing accomplishment of the objectives of the program" in violation of (2) above.

By the recipient's maintaining "auxiliaries" of a given racial or ethnic identity, black and other minority citizens are (f) "provided [a] disposition, service, financial aid, or benefit which is different, or is provided in a different manner, from that provided by others" in violation of (ii); (g) "treated differently from others in determining whether [they] satisf[y] any admission, quota, eligibility, membership, or other requirement or condition which other individuals must meet in order to be provided any disposition, service, financial aid, function, or benefit provided under the program" in violation of (v); (h) afforded an opportunity to participate "which is different from that afforded to others under the program" in violation of (vi); (i) denied "the opportunity to participate as a member of a planning or advisory body which is an integral part of the program" in violation of (vii); and (j) the recipient "through contractual or other arrangements" utilizes "criteria or methods which have the effect of defeating or substantially impairing accomplishment of the objectives of the program" in violation of (2) above.

27. The "auxiliaries" of the Republican National Committee are, in effect, compensatory quotas. Members of these groups are appointed for their race or ethnicity, in an attempt to compensate for the absence of fair representation of blacks, Hispanics, and other races, colors, and national origins on the Party's ruling councils.

28. Plaintiffs, the Freedom Republicans and Lugenia Gordon, president, have sought for more than ten years to persuade the Republican Party and its officials to conform its delegate apportionment rules more closely to the electoral college system, which governs the national presidential election process, in order to provide equal access to the Party's governance without regard to race, color, or national origin.

29. Plaintiffs are harmed by the failure of the defendant (a) to accept jurisdiction of this controversy, (b) to enforce the Civil Rights Act of 1964, and (c) to restrain the expenditure of Federal funds until compliance has been effected. They and other black and minority citizens are harmed in that they and other black and minority citizens are denied the opportunity for equal representation in the Republican Party with other citizens, and hence the opportunity for comparable influence on public policy with that of other citizens. Such harm is irreparable in that such representation and influence as has been denied cannot be remedied nor compensated once it has taken effect.

Prayer for Relief

Plaintiffs Lugenia Gordon and the Freedom Republicans respectfully request this Honorable Court issue an order directed at the Federal Election Commission requiring

1. That the FEC adopt procedures for the implementation of Title VI of the Civil Rights Act of 1964 with

respect to the convention funding provisions of the Federal Election Campaign Act;

2. That the FEC accept jurisdiction over the complaint referenced in paragraph 24 of this complaint;

3. That the FEC enforce compliance by the Republican National Committee with Title VI of the Civil Rights Act of 1964;

4. That the FEC require that no Federal funds in the possession or control of the Republican National Committee be spent until the RNC has complied with Title VI;

5. That in the event of failure of the Republican National Committee to comply, that the FEC withdraw, suspend and terminate, refuse to grant and continue, and recover all Federal financial assistance to, the Republican Party, the Republican National Committee and the Committee on Arrangements for the 1992 Republican National Convention, and that the FEC take all other action necessary to effectuate the purposes of Title VI of the Civil Rights Act of 1964; and

6. That the defendant and the United States pay to the plaintiffs reasonable attorney fees and costs.

Respectfully submitted,

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